

1 DAVID A. ROSENFELD, Bar No. 058163
2 WEINBERG, ROGER & ROSENFELD
3 A Professional Corporation
4 1001 Marina Village Parkway, Suite 200
5 Alameda, California 94501
6 Telephone (510) 337-1001
7 Fax (510) 337-1023
8 E-Mail: drosenfeld@unioncounsel.net

9 Attorneys for Union
10 ROOFERS LOCAL 162

11 UNITED STATES OF AMERICA
12 NATIONAL LABOR RELATIONS BOARD
13 REGION 28

14 A.W. FARRELL & SON, INC.,

No. 28-CA-023502

15 Respondent,

**CORRECTED MOTION FOR
RECONSIDERATION**

16 and

17 ROOFERS LOCAL 162,

18 Charging Party.

19 The Charging Party hereby requests the Board reconsider its decision. Reconsideration is
20 necessary because of the length of time the case has been delayed and because of new Board law
21 not addressed in the Exceptions:

22 1. The Charging Party requests that the Board modify its Decision and Order to
23 conform to the Board's recent decision in *Bud Antle, Inc.*, 359 NLRB No. 140 (2013). In
24 particular, the Charging Party requests that the Board apply footnote 2 which requires that the
25 Notice be mailed "to all current and former employees employed by the Respondent at any time
26 from the onset of the unfair labor practices until the date the notices are mailed." Posting is not a
27 sufficient remedy here where the employer has employed workers through a hiring hall and have
28 employed many employees who no longer work for the employer. Some of the current employees
are just remotely connected to these unfair labor practices.

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1 Respondents should be required to not only mail the Notice but to do at least 2 internet or
2 other searches for better addresses of any mailed notices that are returned by the Post Office.
3 This is a normal requirement of any due process notice in class actions and this same procedure
4 should apply to any mailing notice to insure delivery t those who may have moved.

5 The Board should apply *Bud Antle, Inc.* in this case and require an appropriate mailing of
6 the Notice.

7 2. Additionally, the Respondent should be required to mail the Board's decision
8 along with the Notice. The mere receipt of the Notice only without the Board's decision is not a
9 sufficient explanation of what occurred. The employees should be entitled to read the Board's
10 decision as part of any mailing. This is also necessary to insure that those who are entitled to
11 reimbursement for medical expenses and other make whole remedies are aware of the remedy. It
12 is likely to be several more years until any remedy is implemented. It is thus necessary that
13 effective measures be implemented to insure adequate notice.

14 3. It is time that a Board Notice identify the website where the Board's decision is
15 available. This will enable employees or members to read the Board's decision or locate it. The
16 Board should adopt a procedure by which all notices have some reference to the electronic
17 location where the Board's decision or other appropriate document can be located. Additionally
18 the Respondent should be required to make the Board Decision available on any intra-net site
19 where they generally provide information to employees.

20 4. The Notice should describe what conduct occurred. The proposed Notice only
21 contains what the Respondent will do or not do. There needs to a description such as "The
22 Employer has been found to have unlawfully recognized Sheet Metal Workers International
23 Association, Local 88. The Board has furthermore found that the Employer unlawfully applied
24 the conditions of the Local 88 agreement to the employees. The Board furthermore found that the
25 Employer unlawfully failed to sign and apply the 2010-2012 agreement with Roofers Local 162.
26 As a result of this unlawful conduct, the Employer has been required to implement the remedies
27 described in this Notice. This is a sample and suggested language. It would make any Notice far
28 more effective.

1 5. The Respondent should be required to post the Board's proposed Employee Rights
2 Poster for a period of 5 years. <http://www.nlr.gov/poster> Although one Court has ruled that the
3 Board cannot proactively impose this notice requirement, the Court made it clear that nothing
4 prohibits the Board from imposing a notice posting requirement as a remedy. Wherever an
5 employer violates the Act, that employer should be required to post the Employee Rights Notice
6 as a remedy for 5 years minimum.

7 6. Respondent should be required to post the appropriate notice for the length of time
8 between when the unfair labor practice was committed, or alternatively, when the initial
9 Complaint issued in this case and until the notice are is actually posted. The Board's current rule
10 requiring posting for only sixty days is wholly inadequate. This rule encourages delay on the part
11 of respondents who know that when they eventually post a notice it will be years later, for sixty
12 days only. It is also less effective for the fissured worksite where employees move around, do not
13 come into the worksite or may work from home or remote locations. In order to discourage such
14 delay and to effectively remedy unfair labor practices, the Board should alter its normal remedy
15 to require posting for the length of time when the unfair labor practice is committed or when
16 complaint issues and until notice posting begins. This would be a more effective remedy and
17 moreover will discourage respondents from delaying proceedings so as to delay the posting of the
18 notice until a time when the posting becomes meaningless and short-lived. Here, the delay in
19 posting is likely to be almost a decade. A short posting period of 60 days a decade later serves
20 only to encourage the kind of delay which has occurred here.

21 7. Finally, the Board has before it, Exceptions in cases 28-CB-080496, 28-CB-
22 085690 and 28-CA085434. This case involves the same parties and continued misconduct by the
23 Employer after the Decision issued by Judge Parke in this case. In that case, the Charging Party
24 pointed out in its Exceptions the inadequacy of the remedy issued by Judge Ringler in this later
25 case pending before the Board. We quote below, the discussion in the Brief in Support of
26 Exceptions these remedies should be coordinated and made consistent:

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A. THE REMEDY IS INADEQUATE AS TO FARRELL

The Administrative Law Judge refused to provide any adequate remedy for Farrell’s unfair labor practices, although he suggested strongly that such remedies are necessary. See Ringler 11:18-12:10, 14:17-30. The Board needs to issue an appropriate remedy requiring Farrell to:

1. Sign and apply the 2010-2012 agreement;
2. In the alternative, to reinstate all the conditions which were in effect in 2010 and to make the employees, the Union and the trust funds whole;
3. Reinstate the conditions which were in effect as a result of the 2010-2012 agreement and to make the employees, the Union and Trust Funds whole;
4. Rescind the unlawful agreement with Sheet Metal Workers and to withdrawal recognition from Local 88 for the unit of Farrell’s employees.
5. Reimburse Local 162 for the dues it would have received, with interest, but for the unlawful collective bargaining agreement with SMW Local 88. See W. Coast Cintas Corp., 291 NLRB 152, 156 (1988); New Horizons for the Retarded, 283 NLRB 1173 (1987); J. F. Swick Insulation Co., 247 NLRB 626 (1980); Ogle Protection Service, 183 NLRB 682 (1970).
6. Take the appropriate affirmative action consistent with this;
7. To post the appropriate remedy.
8. To modify the Notice as described below.

These remedies are necessary to remedy the violations found by Judge Parke, and that should have been directed by Judge Ringler. These remedies are plainly necessary to restore Local 162 as the proper representative under Section 9(a) for the employees of Farrell Roofing.

In essence, Farrell has recognized Local 88 in the exactly same bargaining unit which it is required to recognize Local 162, and which it has agreed to recognize Local 162. Perhaps this is explained best by Ms. Pace’s own words when she stated, “We do not understand how [Farrell] can bargain in good faith when it asserts that a contract already exists.” Jt. Exh. 29, BATES 0047. This is a representational dispute which the Board needs to resolve by ordering that Farrell rescind its recognition of Local 88 and recognize Local 162 for the appropriate unit. The status quo should be reinstated, consisting of the expired 2010-2012 agreement, and Farrell should thereafter be directed to bargain.

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B. ANY BOARD NOTICE SHOULD BE READ TO THE EMPLOYEES

The Employer’s continued refusal to recognize Local 162 and its sham bargaining requires the normal (not extraordinary) remedy of reading the notice to the employees. The Board should not characterize this as an extraordinary remedy.

C. THE BOARD’S DECISION SHOULD BE MADE AVAILABLE TO EMPLOYEES

Simply posting those without making the decision available does not adequately inform the employees of the Employer’s misconduct or of the need for the Board remedy.

D. THE NOTICE SHOULD BE MAILED TO EMPLOYEES WHO WORKED FOR FARRELL FROM THE TIME THE UNFAIR LABOR PRACTICE BEGAN TO THE PRESENT

In the construction industry, employees come and go. Directly, it reflects that there have been a number of employees who have worked for Farrell who are no longer working for the company. They should receive notice of the Employer’s violations by having the notice and the Board’s decision mailed to them. Once again, simply mailing the notice is insufficient, because the employees have no access or don’t know about the underlying Board decision which explains the need for the notice. To the extent that the notice should be mailed, it should not be mailed by FedEx, as they are non-union, but should be mailed by United States Postal Service or by United Parcel Service.

E. THE NOTICE SHOULD BE AMENDED

The notice certainly needs to be amended, because Judge Ringler didn’t require that Farrell post a notice with regards to its 8(a)(1) and (5) violations concerning the unlawful recognition of SMW Local 88. To the extent however that the notice was required, the current Board Notice should be modified.

The current Board Notice only makes a brief reference to a violation of federal law. This is inadequate. The employees have no idea what the violations are. The language should be modified as a normal remedy for the following general format:

We have been found by the National Labor Employees Relations Board to have violated federal law in that we did not bargain in good faith with Local 162, we unlawfully withdrew recognition, we unlawfully failed to provide information, we unlawfully changed your conditions of employment . . . , etc.

There needs to be affirmative description of the unlawful conduct in the notice. A brief and unintelligible reference to violating federal law is not adequate. There needs to be a full acknowledgement in the notice of the inappropriate conduct. We recognize that this may make the notice somewhat longer. It is, however, the only way to make the notice effective.

1 Furthermore, the notice should be modified to reflect where
2 employees can read the full Board decision. It is easy enough to
3 put a line in indicating the citation to the Board decision on the
4 Board website.

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12 F. ENFORCING THE BOARD'S NEW POSTING
13 PROVISION THROUGH A REMEDIAL NOTICE

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15 The failure of the Board to resist management attempts to sabotage
16 rulemaking on notice posting does not prevent the Board from
17 requiring that notice to be posted for a period of time by any
18 employer who violates the Act. The Board, as a normal remedy,
19 should require any employer which has found to have violated the
20 Act to post that notice for a period of at least two years. This notice
21 should be posted in addition to the normal remedial notice. This
22 should be a part of the remedial notice. See
23 <http://www.nlr.gov/poster>. The fact that two courts have found
24 that the Board acted without authority to require the notice as a
25 prophylactic measure strengthens the argument that it should be
26 posted as a normal prophylactic measure when there have been
27 violations of the Act.

28 G. THE BOARD SHOULD MODIFY THE NOTICE
POSTED BY EMPLOYERS TO DELETE THE IRRELEVANT
LANGUAGE ADVISING EMPLOYEES OF THE SECTION
CONCERNING THE "RIGHT TO REFRAIN" FROM UNION
ACTIVITY

The Board has traditionally added the "right to refrain" language to
the employer notice. It is time to delete that language. We adopt
the theory of the Fourth Circuit and the D. C Circuit:

Reports on early versions of the NLRA indicate that the Board was
designed to serve a reactive role, with its "quasi-judicial power"
being "restricted to [the enumerated] unfair labor practices and to
cases in which the choice of representatives is doubtful." S.Rep.
No. 73-1184 (1934), reprinted in 1 NLRA Leg. Hist. at 1100. There
is no indication in the Act's legislative history of an intent to allow
the Board to impose duties upon employers proactively; indeed, if
anything, it appears to have been the intent of Congress that the
Board not be empowered to play such a role. Cf. H.R.Rep. No. 74-
969 (1935), reprinted in 2 NLRA Leg. Hist. at 2932 (noting that
Section 11 does not grant the Board the powers of a "roving
commission").

Chamber of Commerce of U.S. v. N.L.R.B., 12-1757, 2013 WL
2678592 (4th Cir. June 14, 2013); see also Nat'l Ass'n of Mfrs. v.
N.L.R.B., 12-5068, 2013 WL 1876234 (D.C. Cir. May 7, 2013)
(holding that the Board no authority to mandate that employers post
a notice unrelated to any specific unfair labor practice, as this
violated lawful 8(c) speech).

These remedies should be adopted in the Judge Ringler decision pending before the Board and
should be concurrently adopted in this case in order to ensure consistency.

1 In effect, because of the pendency of this later case of which the Board was not of at the
2 time it issued this decision, it should grant this Motion for Reconsideration, adopt the additional
3 remedies suggested in this Motion and issue remedies in this and the Judge Ringler case, which
4 are consistent and effective. In all other respects, the Boards decision should be affirmed.

5 Dated: August 1, 2013

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

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7 By: /s/ David A. Rosenfeld
8 DAVID A. ROSENFELD
9 Attorneys for Union
10 ROOFERS LOCAL 162

11 134175/727450

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1 **PROOF OF SERVICE**
2 **(CCP §1013)**

3 I am a citizen of the United States and resident of the State of California. I am employed
4 in the County of Alameda, State of California, in the office of a member of the bar of this Court,
5 at whose direction the service was made. I am over the age of eighteen years and not a party to
6 the within action.

7 On August 1, 2013, I served the following documents in the manner described below:

8 **CORRECTED MOTION FOR RECONSIDERATION**

- 9 (BY U.S. MAIL) I am personally and readily familiar with the business practice of
10 Weinberg, Roger & Rosenfeld for collection and processing of correspondence for
11 mailing with the United States Parcel Service, and I caused such envelope(s) with
12 postage thereon fully prepaid to be placed in the United States Postal Service at
13 Alameda, California.
- 14 (BY FACSIMILE) I am personally and readily familiar with the business practice of
15 Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be
16 transmitted by facsimile and I caused such document(s) on this date to be transmitted by
17 facsimile to the offices of addressee(s) at the numbers listed below.
- 18 (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy
19 through Weinberg, Roger & Rosenfeld's electronic mail system from rfortier-
20 bourne@unioncounsel.net to the email addresses set forth below.

21 On the following part(ies) in this action:

22 Gregory M. Gleine, Esq
23 Nathan A. Higley, Esq.
24 NLRB, Region 18
25 330 Second Avenue South , Suite 790
26 Minneapolis MN 55401-2221
27 Email: nathan.higley@nlrb.gov
28 gregory.gleine@nlrb.gov

Larry A. Smith, Esq
NLRB, Region 28
Resident Office
600 Las Vegas Boulevard South, Suite 400
Las Vegas, NV 89101
Email: Larry.smith@nlrb.gov

Ms. Julie A. Pace
Ms. Heidi Nunn-Gilman
The Cavanagh Law Firm
1850 North Central Avenue, Suite 2400
Phoenix, AZ 85004
Email: hunnngilman@cavanaghlaw.com
jpace@cavanaghlaw.com

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 1, 2013, at Alameda, California.

/s/Rhonda Fortier-Bourne
Rhonda Fortier-Bourne

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